

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANDRE TOLIVER,

Petitioner,

v.

A. J. MALFI, Warden,

Respondent.

No. C 07-2744 WHA (PR)

**DENIAL OF CERTIFICATE OF
APPEALABILITY, MOTION FOR
APPOINTMENT OF COUNSEL, AND
MOTION TO VACATE**

(Docket Nos. 32-34)

This is a habeas case under 28 U.S.C. 2254 filed pro se by a state prisoner. The petition was denied on its merits in an order dated September 22, 2009. Judgment was entered that day. Thereafter, petitioner's motion for reconsideration was denied and petitioner has filed a notice of appeal. He also requests a certificate of appealability ("COA").

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a certificate of appealability (formerly known as a certificate of probable cause to appeal). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate which issues satisfy this standard. *See id.* § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). For the reasons set out in the ruling on the petition, jurists of reason would not find the result

1 debatable or wrong. The motion for a certificate of appealability (docket number 34) is

2 **DENIED.**

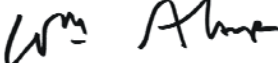
3 Petitioner's motion for appointment of counsel (docket number 33) is also **DENIED**,
4 without prejudice to petitioner's seeking such appointment in the Court of Appeals. As the
5 petition was denied without need for an evidentiary hearing, petitioner's vacate the order
6 denying his motion for an evidentiary hearing (docket number 32) is **DENIED.**

7 The clerk shall transmit the file, including a copy of this order, to the Court of Appeals.
8 *See* Fed. R.App.P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

9 Petitioner may then ask the Court of Appeals to issue the certificate, *see* R.App.P. 22(b)(1), or if
10 he does not, the notice of appeal will be construed as such a request, *see* R.App.P. 22(b)(2).

11 **IT IS SO ORDERED.**

12
13 Dated: January 11, 2010.

14 
15 _____
16 WILLIAM ALSUP
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27

28 G:\PRO-SE\WHA\HC.07\TOLIVER2744.COA.wpd